

**California Regional Water Quality Control Board
San Francisco Bay Region
Prosecutorial Staff Report**

To: Board Members

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File No. 43S1069 (MS)

From: Prosecutorial Staff

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Subject: **TWC Storage, LLC, 1165 East Arques Avenue, Sunnyvale, Santa Clara County-**
Hearing to Consider Imposition of Administrative Civil Liability or Referral to the
Attorney General for Unauthorized Discharge of Waste and a Hazardous Substance into
Waters of the State

This prosecutorial staff report provides information supporting the issuance of an administrative civil liability (ACL) against TWC Storage, LLC (TWC), for discharging a hazardous waste and a hazardous substance, perchloroethylene (PCE), and doing so without filing the required reports. A draft Tentative Order (Tentative Order) to impose liability in the amount of \$40,000 is attached as **Exhibit A** hereto and is based on Administrative Civil Liability Complaint No. R2-2006-02 (Complaint), attached as **Exhibit B** hereto, issued on January 27, 2006.

Spill Description

On July 15, 2005, TWC commenced a release of PCE at 1165 East Arques Avenue in Sunnyvale southwest of the intersection of Highway 101 and the Lawrence Expressway. The site is an active federal Superfund site under Water Board oversight. On that date, TWC, through its demolition contractor, was conducting site demolition activities at the site in connection with developing the site as a self storage facility. During demolition and bulldozing activities on July 15, 2005, TWC damaged an electrical transformer, initiating a spill of PCE. As more fully described below, the damaged transformer was placed on the top of demolition debris and was left at the site until July 18, 2005, when pumping of its contents commenced. During these four days, PCE leaked out of the transformer, soaked into the soil, and infiltrated into the underlying shallow groundwater aquifer. TWC spilled 250 gallons of PCE (pages 692, 702, and 773 of TWC's written evidence). TWC did not notify the Office of Emergency Services (OES) about the spill until July 19, 2005.

Photographs of the site, the damaged transformer, demolition debris, demolition equipment and hazardous waste containers are attached hereto as **Exhibit C**.

Detailed Chronology of Events.

Friday, July 15, 2005:

TWC's demolition contractor uses a large excavator to remove the transformer from the concrete utility pad as part of demolition activities at the site and in the process damages the transformer. According to TWC's contractor, the Qualogy Construction, Inc.'s Incident Tracking Report (QCI Report), attached hereto as **Exhibit D**, the excavator operator does not verify if the transformer still contains liquid. The transformer is marked "Perclene Filled" (perclene is the commercial name for PCE). **Exhibit C**. The QCI Report notes that while the transformer is in the air, the excavator operator observes liquid "leaking from the bottom of the transformer." **Exhibit D**. The QCI Report further states that the excavator operator places the damaged transformer to drain within an existing concrete containment area on top of a pile of soils and other construction debris and subsequently relocates the transformer to another area to "fully drain out/dry out." **Exhibit D**.

A representative of the prior landowner, Advanced Micro Devices (AMD), is on site after the transformer is damaged. Her observations are described in an email attached hereto as **Exhibit E**.

No cleanup activity takes place. To minimize PCE evaporation and vapor releases, the spill area and the damaged transformer are covered over with plastic sheeting. **Exhibit D**, **Exhibit F** (City of Sunnyvale Investigation Report Excerpts) and **Exhibit G** (Blakely Email) hereto. TWC does attempt to find an environmental clean-up company and finds Clean Harbors Environmental Services (Clean Harbors). **Exhibit D**.

Saturday, July 16, 2005:

No cleanup activity takes place. TWC meets with Clean Harbors and it orders the required equipment to start the clean-up on Sunday morning. **Exhibit D**; see also **Exhibit G**.

Sunday, July 17, 2005:

According to the QCI Report and Clean Harbors' Job Reports (attached hereto as **Exhibit H**), Clean Harbors commences clean-up activities, consisting of accepting equipment and bins and using a backhoe to load contaminated soils and debris into roll-off bins. **Exhibit D** and **Exhibit H**. Equipment problems arise, however, and work is stopped. **Exhibit D** and **Exhibit H**.

Monday, July 18, 2005:

Clean Harbors completes a majority of contaminated soil and debris removal. **Exhibit D** and **Exhibit H**. This is the first date that pumps and drums are brought on-site to drain PCE

from the damaged transformer and a second, undamaged transformer. **Exhibit D** and **Exhibit H**. Pumping of PCE commences and concludes the next day. **Exhibit H**.

Tuesday, July 19, 2005:

TWC meets with Clean Harbors to review progress of the clean-up activities, by which time, according to the QCI Report, Clean Harbors “had completed all soils and debris removal, as well as the pumping of the second transformer and removal of all liquids in the broken transformer.” **Exhibit D**. Clean Harbors’ Job Report indicates transformer pumping continued to occur on this date. **Exhibit H**. TWC and AMD discuss “manifesting of the roll off bins and drums with the [PCE] that had been removed from the transformers.” **Exhibit D**. QCI and Clean Harbors discuss the procedures to remove the transformers and Clean Harbors states it “would fill the transformers with an absorbing filler (vermiculite), plastic wrap the transformers, and palletize the transformers for removal by flat bed truck.” **Exhibit D**.

The City of Sunnyvale hazardous materials inspector, Mr. Ron Staricha, while driving by the site notices five hazardous waste drums and two roll-off bins. **Exhibit F**. He therefore makes a site visit. During the site visit he learns about the PCE release. Mr. Staricha inquires why his agency was not notified. He is told that notification to OES was made on Monday July 18, 2005. **Exhibit F**. Mr. Staricha's site inspection report states, however, that OES notification occurred on Tuesday July 19, 2005 at 10:42 A.M. **Exhibit F**.

Wednesday, July 20, 2005:

The transformers are filled with vermiculite and shrink-wrapped for transport. **Exhibit D** and **Exhibit H**.

Days and Nature of Discharge

From the above facts, it is clear that—at a minimum—four days of PCE discharge occurred. The earliest possible date that PCE was pumped out from the damaged transformer was the fourth day (Monday, July 18) following the initial release on Friday, July 15. Prior to pumping, the damaged transformer was left on a debris pile to drain out. Nothing in the record demonstrates that affirmative steps were taken to seal the damaged transformer and stop the leak. Instead, the damaged transformer was left on a debris pile for PCE to drain out.

Electrical transformers are known to contain dielectric and cooling liquids such as polychlorinated biphenyls (PCBs) and PCE. Additionally, as stated above, the transformer on the site was clearly marked “Perclene filled” in stenciled letters **Exhibit C**. The transformer also had gauges that might have indicated the transformer contained liquid. It is a common, routine and accepted practice to drain these liquids out of the transformers prior to dismantling or demolition. TWC did not do this. Additionally, the City’s special demolition permit conditions were imposed on TWC to protect the daycare center occupants on the adjacent property. **Exhibit F**. TWC did not exercise caution during its demolition activities even when so advised in advance by the City.

A 250-gallon spill of PCE is a very significant discharge. PCE is a highly toxic substance. PCE is a hazardous waste and hazardous substance. It is a known carcinogen and inhalation may affect the central nervous system ranging from light-headedness, nausea and vomiting to unconsciousness and death. The California drinking water maximum contaminant level for PCE is 5 ug/l. A groundwater sample collected from a monitoring well near the PCE spill on October 13, 2005 (three months after the discharges), contained 12,000 ug/l of PCE.

Water Code Violations

TWC violated two Water Code sections, 13264 and 13350(b)(1), for which administrative civil liability may be imposed.

Water Code section 13264 prohibits discharges of waste prior to filing a report of waste discharge (ROWD). Water Code section 13265(c) and (d)(1) authorize the imposition of an administrative civil liability for discharging a hazardous waste such as PCE without filing the required ROWD, at a maximum amount of \$5,000 per day of violation. Liability under Water Code section 13265(c) cannot be imposed if (1) the discharger is not negligent **and** immediately files a ROWD or (2) the Board determines the violation of Water Code section 13264 was insubstantial. TWC did not file a ROWD and therefore the first defense to liability is not available to TWC and the Board need not determine whether TWC was negligent. As to the second defense, discharge of a hazardous waste such as PCE without filing a ROWD is not an insubstantial violation. TWC discharged PCE for at least four days without filing a ROWD, which amounts to a maximum civil liability under Water Code section 13265 of \$20,000.

Water Code section 13350(b)(1) states that any person, who without regard to intent or negligence, causes or permits any hazardous substance to be discharged into waters of the State except in accordance with waste discharge requirements shall be strictly liable civilly. Civil liability may be imposed at a maximum amount of \$5,000 per day of violation or on a per gallon basis not to exceed \$10 for each gallon of waste discharged. TWC discharged PCE, a hazardous substance, for a minimum of four days and is therefore strictly liable civilly for the discharge. The maximum civil liability under this Water Code section is \$20,000.

Complaint

Based on the factors to be considered in assessing administrative civil liability, the Complaint was issued in the maximum amount of \$40,000. The factors to be considered are:

- a) the nature, circumstances, extent and gravity of the violations;
- b) whether the discharge is susceptible to cleanup or abatement;
- c) the degree of toxicity of the discharge;
- d) the violator's ability to pay and the effect on the ability to continue in business;
- e) voluntary cleanup efforts undertaken;
- f) any prior history of violations;
- g) the degree of culpability;
- h) economic benefits or savings from the violation, if any; and
- i) other matters as justice may require.

Civil liability on a per gallon basis was not pursued because it yields a smaller liability. A larger liability is appropriate due to the gravity of the violations as detailed in the Complaint. This site is a known, active, federal Superfund site and more care should have been exercised in connection with transformer demolition and dismantling activities. The site is also immediately adjacent to a children's daycare center.

TWC has excavated and removed over 2,300 cubic yards of PCE-impacted soil from the site (page 810 of TWC's written evidence) as part of the cleanup of the PCE spilled from the transformer. In the last ten months since the discharges occurred, TWC has been responsive in conducting investigations and cleanup of soil and groundwater impacted from the spill, as it is required to do. However, the Complaint was issued with the maximum civil liability amount proposed given the nature, circumstances, extent and gravity of the violations and the toxicity of PCE, as more fully described in the Complaint **Exhibit B**.

The Complaint was not directed to the prior landowner, AMD, which remains responsible for the cleanup of the pre-existing contamination on the site, because AMD did not damage the transformer and discharge the PCE and was not required to file a ROWD.

Procedural Issues

Written evidence was required to be submitted by April 5, 2006, and TWC complied and submitted 1355 pages of documents, but without an explanation of its evidence. Because of this, as of the writing of this staff report, prosecutorial staff does not know the substance of TWC's objections to the Complaint. TWC counsel intends to submit a legal brief by May 2, 2006, which, according to TWC counsel, will tell TWC's side of the story and argue against the Complaint. The TWC legal brief will be included in the Board agenda materials. Staff will address issues raised by TWC's May 2 submittal at the Board hearing.

Tentative Order Imposing Administrative Civil Liability Complaint

The Tentative Order would impose administrative civil liability of \$40,000 consistent with the Complaint and based on the factors to be considered in assessing administrative civil liability. The Board has several enforcement options. The Board can adopt the Tentative Order, or impose administrative civil liability in an amount it deems appropriate (up to the \$40,000 maximum), or decline to impose administrative civil liability, or refer the matter to the Attorney General.

Attachments:

Exhibit A	Tentative Order
Exhibit B	Complaint
Exhibit C	Site Photographs
Exhibit D	QCI Report
Exhibit E	AMD Email
Exhibit F	City of Sunnyvale Investigation Report Excerpts
Exhibit G	Blakely Email
Exhibit H	Clean Harbors' Job Reports